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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JR209
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Mr Donal Sayers KC with Mr Mark Bassett BL (instructed by KRW Law, Solicitors) for the Applicant
Dr Tony McGleenan KC with Mr Philip McAteer BL (instructed by the Crown Solicitor's Office) for the Respondent

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COLTON J

Introduction

Anonymity

[1] The applicant is a victim of child sexual abuse by a Father Malachy Finnegan whilst he was a pupil at St Colman's College, Newry.

[2] The applicant sought an order from the court restricting the publication of his name in relation to these proceedings.

[3] The court received affidavit evidence from the applicant setting out the basis for his request for anonymity together with written submissions from counsel, Mr Mark Bassett, on his behalf.

[4] In considering the application the court started with the proposition that judicial review proceedings should be conducted in public without anonymisation.

[5] The court noted that consideration of the application involved the disclosure of intimate and distressing details of the applicant's private life relating to abuse he suffered as a child. The court further noted that the abuse he suffered has had an

adverse impact on his mental health in the past, his relationships to this day and has a potential to dissuade him from pursuing this public law challenge.

[6] The court accepts that publication of the applicant's identity and the details surrounding the background to the application engage his article 8 ECHR rights. In that event, the court must strike a balance between the right of the applicant's respect for his private life protected by article 8 and the rights of freedom of expression provided by article 10 ECHR in addition to the well-established common law position that legal proceedings should be conducted in public.

[7] Having carried out that exercise the court considered that it would be appropriate to impose an order restricting publication of the applicant's name or any material that might lead to his identification. It has done so bearing in mind the potential for the impact on the applicant's article 8 rights should his name be published in relation to these proceedings. Withholding his name from publication will not prevent the fair, accurate and accessible reporting of the proceedings. The subject matter of the challenge does not require the publication of the applicant's name alongside details of the claim he makes in respect of the policy challenge. It will not have any impact on the proposed respondent's ability to defend the claim as it is fully aware of the identity of the applicant.

[8] The court therefore considers that protecting the applicant's identity in these proceedings is the minimum proportionate interference required with open justice to protect the applicant's article 8 rights.

[9] Accordingly, the court directed that nothing should be published in these proceedings which would identity the name of the applicant. The proceedings were therefore anonymised, and he will be referred to as JR209 in this judgment.

Background

[10] In his affidavit the applicant sets out the nature of the sexual abuse he suffered at the hands of Father Malachy Finnegan whilst he was a pupil at St Colman's College, Newry, and the impact it had on him in later life. Father Finnegan was the President of the College.

[11] In 2019 he made a detailed statement to the PSNI regarding his abuse by Father Finnegan.

[12] He instructed KRW Law to act on his behalf in or around 25 November 2020. It is clear from documentation exhibited by the applicant's solicitor that KRW Law are acting for a number of victims of Father Finnegan. They have publicly called for an Inquiry into the claims of abuse levelled against Father Finnegan and claims that he may also have been an RUC informer.

[13] On 4 December 2020 the applicant's solicitor wrote on behalf of "our client(s): [JR209] and others."

[14] The substance of the letter contains the following:

> "On foot of this, there has been speculation in the media and other circles of Father Finnegan's perceived position as an informer or agent for the Royal Ulster Constabulary…
>
> We write to your office seeking confirmation/clarification in relation to the following:
>
> 1. Was Father Malachy Finnegan an informer for the RUC?
>
> 2. If you wish to rely on the position of 'neither confirm nor deny' (NCND) please provide us with your reasons why.
>
> 3. If NCND is relied upon, please provide us with the legislative basis, PSNI Policy or public facing document underpinning your decision."

[15] On 10 December 2020 the Crown Solicitor's Office replied on behalf of the proposed respondent in the following terms:

> "Dear Sirs
>
> **Your Client: [JR209] and others**
>
> I refer to your letter dated 4 December 2020 addressed to the office of the Chief Constable of the Police Service of Northern Ireland. I am instructed to respond on behalf of the Chief Constable of the Police Service of Northern Ireland.
>
> I advise that in relation to the issues raised in your correspondence, the PSNI neither confirms nor denies whether Malachy Finnegan was, or ever has been, an agent of the PSNI. The PSNI neither confirms nor denies speculations, allegations and assertions in relation to Intelligence matters."

[16] On the same date the applicant's solicitors wrote to the Crown Solicitor's Office in response in the following terms:

> "Firstly, we note that your client has adopted the position that it neither confirms nor denies (NCND) that Father Malachy Finnegan was an informer or agent for the PSNI as a successor to the RUC. Please provide us with your reasons for this decision.
>
> Secondly, as raised in our correspondence dated 4 December 2020 since NCND has been relied upon by your client, please provide us with a legislative basis, PSNI Policy or public facing document underpinning your decision.
>
> We look forward to hearing from you."

[17] There was no reply to this correspondence and a reminder was sent on 11 January 2021 seeking "your urgent reply within seven days hereof."

[18] Thereafter, it appears that no further steps were taken in relation to this matter until a pre-action protocol letter was sent on behalf of JR209 on 17 December 2021. A response was received on 4 February 2022.

[19] The substance of the response was in the following terms:

> "The PSNI neither confirms nor denies that Father Malachy Finnegan was, or ever had been, an agent of the PSNI. The PSNI neither confirms nor denies speculations, allegations and assertions in relation to intelligence matters.
>
> This issue was raised in previous pre-action correspondence from your office on behalf of your client (AB) and (CB) in September 2019, on behalf of your client (CD) in October 2019. This office responded to the pre-action correspondence on this issue in November 2019. The matters your client now seeks to litigate 'first arose' some years ago and, if proceedings are issued we will rely upon the application of Order 53 Rule 4 with respect to the delay in bringing proceedings.
>
> In any event, the legal basis for your contention in respect of the application of the NCND policy is unsustainable. The legality of the NCND policy has been repeatedly endorsed in the High Court. Carswell LCJ gave one of the leading judgments on this topic in *Re Scappaticci* [2003] NIQB 56 (see paras 14-16) which have confirmed the legality of the NCND policy. In 2006 the Investigatory

Powers Tribunal gave judgment in the case of *Frank-Steiner v SIS*, IPT/06/81/CH. The IPT at paragraph 45 endorsed the proposition that:

> 'For an NCND policy to be effective in ensuring that information is not revealed about individual cases, the NCND response must be provided **invariably**. This is not a novel point; it lies at the heart of the NCND policy as it is, and always has been, applied by the security and intelligence agencies.'

Turning to the specific legal points raised in your letter:

(i) The contention of the application of the NCND policy as contrary to the common law cannot be sustained in light of the judgment of the High Court in *Scappaticci* as repeatedly endorsed in later judgments;

…

(iii) The argument that your client has a right under article 10 of the ECHR to receive information is also without merit. Article 10 provides qualified rights under freedom of expression. It does not give rise to any legal right to set aside the NCND policy where same is properly asserted by a public authority.

…

(v) The challenge based on irrationality would be inarguable insofar as reliance upon NCND in appropriate cases has been repeatedly endorsed by the higher courts."

[20] The application for leave in this case was issued on 16 March 2022. In the Order 53 Statement the impugned decision is described as the reliance "upon the doctrine of 'neither confirm nor deny' (NCND) in response to a request to confirm whether Father Malachy Finnegan (deceased) was a State agent/informer. Reliance on this approach was confirmed to the applicant's representatives in correspondence dated 10 December 2020, and repeated in the PAP response letter of 4 February 2022."

Delay

[21] RCJ R53, Rule 4(1) provides:

> "4-(1) An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application has been made."

When did the grounds for the application first arise?

[22] The grounds in relation to this applicant clearly arose on receipt of the letter of 10 December 2020 (the letter appears to have been received on the same date). In this regard the applicant cannot avail of the pre-action response of 4 February 2022 as a resetting of the clock for the purposes of limitation. As Lewis LJ said in *R(A) v Secretary of State for the Home Department* [2021] EWCA Civ 119:

> "A claimant cannot avoid the application of the time limits by writing to the defendant and then seeking to characterise a response as a fresh decision."

The application for leave was issued on 16 March 2022, 15 months after the date when the grounds for the application first arose and more than 12 months out of time, in the context of a three-month time limit.

[23] The proposed application is therefore significantly out of time and an extension of time is required in order to bring the application.

[24] In its case management directions on 23 March 2022, the court directed that if the application was to proceed an affidavit must be filed addressing, inter alia, the issue of delay and the request for an extension of time. An affidavit was filed by the applicant on 29 March 2022, but it does not address the issue of delay or the request for an extension of time. The applicant's solicitor filed an affidavit on 1 July 2022 dealing with the question of delay. It does not explain the reason for any delay between 11 January 2021 and 17 December 2021. In terms of reasons for extending time the affidavit relies on many of the grounds contended for by Mr Sayers in his submissions.

[25] In short, the court has no grounds before it which explain the delay in bringing the application.

Is there good reason for extending the period within which the application should have been made?

[26] Mr Sayers' impressive submissions point to the fact that the public law error contended for by the applicant is an ongoing one and argues that there is a strong public interest in the court determining whether the proposed respondent can rely on NCND to operate as an absolute basis for refusing the request made by the applicant. He points out that a comparable challenge was previously considered by other victims of Father Finnegan and that it is possible that another victim could bring a similar challenge. It is argued therefore that there would be a practical benefit to the parties and the justice system to deal with the issue in these proceedings rather than in future ones.

[27] In light of the public interest argument I propose to examine the substance of the applicant's case.

The Applicant's Case

[28] The applicant's challenge is essentially twofold.

[29] Firstly, it is alleged that the proposed respondent has unlawfully fettered its discretion by adopting a rigid and inflexible policy which did not involve any consideration of the individual request.

[30] Secondly, the applicant argues that the reliance on the NCND policy in respect of the applicant's request constitutes an unlawful interference with his rights under article 10 ECHR.

Fettering of Discretion

[31] The applicant contends that there has not been any individual consideration of his request but rather the proposed respondent has adopted a reflexive reliance on NCND.

[32] In this regard the applicant relies on the well-established principle that a public authority vested with discretionary powers must not operate a policy whose nature is inflexible so as to automatically determine the outcome.

[33] Mr Sayers refers to the judgment of Lord Browne-Wilkinson in the case of *Secretary of State for the Home Department, ex parte Venables* [1998] AC 407, at 496-497:

> "When Parliament confers a discretionary power exercisable from time to time over a period, such power must be exercised on each occasion in the light of the circumstances at that time. In consequence, the person on whom the power is conferred cannot fetter the future exercise of his discretion by committing himself now as to the way in which he will exercise his power in the future. He cannot exercise the power nunc pro tunc. By the same

> token, the person on whom the power has been conferred cannot fetter the way he will use that power by ruling out of consideration on the future exercise of that power factors which may then be relevant to such exercise.
>
> These considerations do not preclude the person on whom the power is conferred from developing and applying a policy as to the approach which he will adopt in the generality of cases …
>
> But the position is different if the policy adopted is such as to preclude the person on whom the power is conferred from departing from the policy or from taking into account circumstances which are relevant to the particular case in relation to which the discretion is being exercised.
>
> If such an inflexible and invariable policy is adopted, both the policy and the decisions taken pursuant to it will be unlawful …"

[34] Bearing this principle in mind Mr Sayers points to several factors which support the contention that the policy of NCND should not be applied to the particular circumstances of the applicant's case. Mr Sayers refers to the underlying statutory scheme governing the functions of the police. Sections 31A and 32 of the Police (Northern Ireland) Act 2000 impose duties on the police to secure community support and to bring offenders to justice. In exercising its discretion to respond to the applicant's request it is argued that a duty to promote the objects of the statute points towards the non-application of the NCND policy.

[35] This should be seen in the context of what is at the heart of this case, namely child sexual abuse in schools. That such abuse might be tolerated by State agencies for the purposes of intelligence material is a matter of concern.

[36] Father Finnegan is deceased. There is no suggestion that disclosure would risk the safety, health or life of any particular agent. These matters relate to events which have long passed and should not require any substantial investigation on the police to disclose the information sought.

[37] Bearing these matters in mind the fundamental submission on behalf of the applicant is that the proposed respondent cannot lawfully adopt a policy of blanket refusal in response to requests for confirmation of the identity of an agent.

[38] In response Dr McGleenan, on behalf of the proposed respondent, whilst strongly pressing the delay point, says that in any event the application is unarguable.

[39] There can be no doubt that the legality of the NCND policy has been repeatedly endorsed by the courts in this jurisdiction. The key decision is that of *Re Scappaticci* [2003] NIQB 56 and in particular paragraphs 15-16 which affirm the legality of the NCND policy:

> "[15] The reasons for adopting and adhering to the NCND policy appear from paragraph 3 of Sir Joseph Pilling's affidavit. To state that a person is an agent would be likely to place him in immediate danger from terrorist organisations. To deny that he is an agent may in some cases endanger another person, who may be under suspicion from terrorists. Most significant, once the Government confirms in the case of one person that he is not an agent, a refusal to comment in the case of another person would then give rise to an immediate suspicion that the latter was in fact an agent, so possibly placing his life in grave danger (a comparable proposition may be found in paragraph 35(3)(a) of the decision of the Information Tribunal in *Baker v Secretary of State for the Home Department* (2001), a copy of which was furnished to me). If the Government were to deny in all cases that persons named were agents, the denials would become meaningless and would carry no weight. Moreover, if agents became uneasy about the risk to themselves being increased through the effect of Government statements, their willingness to give information and the supply of intelligence vital to the war against terrorism could be gravely reduced. There is in my judgment substantial force in these propositions and they form powerful reasons for maintaining the strict NCND policy.
>
> [16] Courts of law in our constitutional system have traditionally been reluctant, and in some areas unwilling, to adjudicate on questions involving issues of national security. The issue whether a particular matter is in the interests of national security is one of policy and judgment, and the courts have tended to say that that is for the executive and not for the courts to determine: cf *Chandler v Director of Public Prosecutions* [1964] AC 763; *Secretary of State for the Home Department v Rehman* [2002] 1 All ER 122 at paragraph 50, per Lord Hoffmann."

[40] For an example of when this principle has been endorsed see *X v MOD* [2020] NI 221 at para [38].

[41] In 2006 the Investigatory Powers Tribunal gave judgment in the case of *Frank-Steiner v SIS*, IPT/06/81/CH. In that case the complainant issued a complaint seeking disclosure of information held by the Secret Intelligence Service (SIS) in relation as to whether his uncle by marriage had been a spy for Britain during the war.

At para [4] the judgment states:

> "[4] The standard response in a case where it is not desired to disclose whether or not a requested party is in possession of any documents or knowledge was thus given, namely, such as to 'neither confirm nor deny' ('NCND') that any such documents exist. This NCND response, if appropriate, is well-established and lawful. Its legitimate and significant purpose in value has been discussed and ratified by the courts … It is essential for there to be a consistent response in such a situation. If, in a hypothetical case, whether or not it might be legitimate not to disclose any documents that do exist, no documents in fact exist, an answer is given to an applicant that "there are no documents", then an NCND response given to a different applicant in another case will reasonably lead that other applicant to conclude that, because he has <u>not</u> been told the documents do <u>not</u> exist, that he is entitled to assume that they do. Similarly, if the documents do exist, the very disclosure of their existence, though coupled with a justification for retaining them, may be itself damaging, depending upon the identity and purpose of the applicant, and may indeed be all that the applicant wants to know."

[42] Dealing with the question of public records the court referred to an "important reference" by the then Foreign and Commonwealth Secretary, Mr Robin Cook, on 12 February 1998 under the heading "MI6":

> "The records of the Secret Intelligence Service are not released; they are retained under section 3(4) of the Public Records Act 1958. Having reviewed the arguments, I recognise that there is an overwhelmingly strong reason for this policy. When individuals or organisations cooperate with the service, they do so because an unshakeable commitment is given never to reveal their identities. This essential trust would be undermined by a perception that undertakings of confidentiality were honoured for only a limited duration. In many cases, the risk of retribution of those individuals can extend beyond a single generation."

[43] Ultimately, the para [45] the Tribunal endorsed the proposition that:

> "For an NCND policy to be effective in ensuring that information is not revealed about individual cases, the NCND response must be provided invariably. This is not a novel point: it lies at the heart of the NCND policy as it is, and always has been, applied by the security and intelligence agencies."

[44] It will be seen that the policy under challenge in this application is well embedded and approved in our law. It has been endorsed by both the High Court and the Specialist Tribunal established to deal with disclosure of such material. That is not to say that one can rule out a truly exceptional case where the policy should not be applied. In applying the policy in this case, the proposed respondent was fully aware of the background circumstances.

Article 10 ECHR

[45] Article 10 of the ECHR is entitled 'Freedom of Expression.' It provides as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[46] Mr Sayers seeks to argue that the right "to receive information and ideas without interference by a public authority" includes the right of this applicant to receive any information held by the PSNI in relation to whether Father Finnegan was or has been an agent of the PSNI. He realistically concedes that domestic authority at the highest level is against him on this point but argues that more recent jurisprudence of the ECtHR suggests that such a right or obligation may arise.

[47] The relevant domestic authority is that of the Supreme Court in *Kennedy v Charity Commission* [2014] UKSC 20.

[48] In *Kennedy* the Supreme Court held that article 10 ECHR did not afford a right to access information held by public authorities.

[49] Mr Sayers accepts that this may have been an accurate statement of the law at the time of judgment. He argues that based on the decision in *Magyar Helsinki Bizottsag v Hungary* [2016] ECHR 975 this is no longer the case. At paragraph 156, the court said:

> "156. In short, the time has come to clarify the classic principles. The Court continues to consider that 'the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him.' Moreover, 'the right to receive information cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own motion.' The Court further considers that article 10 does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual. However, as is seen from the above analysis, such a right or obligation may arise, firstly, where disclosure of the information has been imposed by a judicial order which has gained legal force (which is not an issue in the present case) and, secondly, in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular 'the freedom to receive and impart information' and where its denial constitutes an interference with that right."

[50] In the judgment the court also provided some assistance on the threshold criteria for the right of access to State held information:

- It is necessary for the person requesting the information to receive and impart information that he has to others. Particular emphasis will be placed on whether the gathering of information was a relevant preparatory step contributing to public debate (para 158-159).

- The information sought must be of public interest (para 160-163).

- The role of the applicant is a relevant and important consideration of whether the person seeking access to the information in question does so with a view to informing the public in the capacity of a public watchdog (para 164-166).

- The fact that the information requested is ready and available ought to constitute an important criteria in the overall assessment (para 169-170).

[51] The decision in *Magyar Helsinki* has not been endorsed by any UK court. It has been rejected in *Moss v ICO* [2020] UKUT 242 (ACC).

[52] This matter was expressly considered by Mr Justice Humphreys in *Re Paula Lavery* [2022] NIQB 19. Having set out the principles in *Magyar Helsinki* he goes on to say:

> "[36] As demonstrated above, Magyar has expanded the understanding of article 10(1) so that as a matter of ECtHR law it now covers, albeit in limited circumstances, a right of access to information. This was not disputed before me. However, the view of five members of the Supreme Court in *Kennedy*, as well as the Court of Appeal in *Kennedy* and two if not three members of the Supreme Court in *Sugar (No.2*), in my judgment, is that domestic law does not consider article 10(1) extends to include a right of access to information, and I consider myself bound by the rules of precedent to follow this view."
>
> [37] I consider that the analysis of Judge Wright is correct. Although this aspect of the judgment in *Kennedy* was technically obiter, it was arrived at following full argument before the Supreme Court. In any event, the determination relating to the scope of article 10 was part of the ratio of the court in *Sugar*.
>
> [38] Section 2 of the Human Rights Act 1998 requires a domestic court to "take into account" any decision of the European Court of Human Rights when determining a question which has arisen in connection with Convention rights. This, as the House of Lords held in *Kay v Lambeth LBC* [2006] 2 AC 465, preserves the principle of stare decisis, recognised by Lord Bingham as a "cornerstone of our legal system." When faced with an apparent conflict between a domestic judgment with precedent effect and a Strasbourg decision, he held:
>
> > 'As Lord Hailsham observed ([1972] AC 1027, 1054), "in legal matters, some degree of certainty is at least as valuable a part of justice as perfection." That degree of certainty is best achieved by adhering, even in the Convention

> context, to our rules of precedent. It will of course be the duty of judges to review Convention arguments addressed to them, and if they consider a binding precedent to be, or possibly to be, inconsistent with Strasbourg authority, they may express their views and give leave to appeal, as the Court of Appeal did here. Leap-frog appeals may be appropriate. In this way, in my opinion, they discharge their duty under the 1998 Act. But they should follow the binding precedent, as again the Court of Appeal did here.'

[39] As Scoffield J commented in *Re ABO Wind Farm (NI) Limited's Application* [2022] NIQB 3:

> 'Although an undoubtedly technical point, a decision of the Supreme Court on an appeal from a court in England and Wales (which does not involve a devolution matter) is not binding on the courts of Northern Ireland. Only a Supreme Court decision on appeal from the courts of this jurisdiction is so binding. That is the effect of section 41 of the Constitutional Reform Act 2005.'

> [40] On this analysis, it could be argued that neither *Kennedy* nor *Sugar* are binding on this court and I would be free to follow the Grand Chamber decision in Magyar. However, to do so would be to ignore the highly persuasive value of the decisions of the Supreme Court reached after full argument on the issues. I therefore propose to follow the approach set out in *Kennedy* and *Sugar* and to hold that the applicant's claim to a right to disclosure on the basis of article 10 is unarguable."

[53] The court agrees with the approach of Mr Justice Humphreys and considers that this is an answer to the article 10 point raised by the applicant. This is particularly so in the context of an application to extend time for good reason.

[54] However, the court also considers that it is not at all clear that the purported expansion of the article 10 jurisprudence as a result of *Magyar Helsinki* would be sufficient for the applicant to establish a breach. Article 10 remains a qualified right subject to considerations of necessary restrictions including interests of national security. It would appear (and this is discussed later) that the applicant's interest is

personal in the context of seeking advice in relation to civil proceedings rather than acting in a 'watchdog' capacity.

Are there alternative approaches available to the applicant?

[55] It appears that the purpose for which the information is sought on behalf of the applicant is for a civil action. In this regard the court notes that there are well settled procedures for dealing with situations in which the proposed respondent relies upon a line of defence based on NCND. In the context of civil proceedings such a defence can be examined through the prism of the Closed Material Procedure mechanism or by way of the Public Interest Immunity procedure. This can and does happen in civil proceedings in this jurisdiction. There is a coherent systemic approach to such defences.

[56] Furthermore, it will be noted that the applicant has the option of a complaint to the Information Commissioner and appeal thereafter if dissatisfied with the outcome. The ICO is an expert public body given the statutory jurisdiction to deal with such matters and opens further statutorily defined avenues for appeal thereafter.

[57] This is not a bar to a potential judicial review but, nonetheless, is an important factor in the court's consideration.

[58] Of course, the court has no way of knowing whether there is any substance in the speculation about whether or not Father Finnegan was in fact a police informant and whether this had any impact on his ability to commit acts of sexual abuse. In the application the applicant's solicitor places reliance on a statement by Bishop McAreavey in November 2018 that he had raised the issue of Father Finnegan being a police informer with the PSNI. When examining the report of Dr McAreavey's statement what he said was:

> "Following the widespread national media publications raising concerns that Malachy Finnegan may have been a police informant, I can confirm that this exact concern was specifically raised by the former Bishop of Dromore, John McAreavey, on 16 November 2018 with police officers who were investigating the allegations of abuse perpetrated by Malachy Finnegan."

[59] There is nothing in this statement which suggests that Bishop McAreavey had any knowledge or information to the effect that there was substance in the speculation.

Conclusion

[60] Returning to the question of delay the court does not consider that there are good grounds for extending the period within which this application has been made. This conclusion is based on a number of factors.

[61] The delay here is egregious. There has been no explanation for the delay. The general issue had, in fact, been raised even earlier so there was nothing novel about the issue when the applicant received the decision under challenge on 10 December 2020.

[62] What is challenged here is a well-established and embedded policy, endorsed by the courts in this jurisdiction and by the Specialist Investigatory Powers Tribunal established to deal with disclosure of material in the possession of the security services. Any challenge to that policy should be based on a timely application in circumstances where the court can scrutinise whether there is any basis for arguing that the policy should not be applied.

[63] There are mechanisms in place to deal with the NCND policy as a potential defence in civil proceedings contemplated by the applicant.

[64] There is a further alternative remedy available to the applicant in the form of a complaint to the ICO.

[65] For these reasons leave to apply for judicial review is refused.